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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1124

J. F. LIDDON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now your petitioner and respectfully petitions that a writ of certiorari issue from this Court to the United States Court of Appeals for the Fifth Circuit to review the judgment entered in the above entitled cause.

OFFICIAL REPORTS OF DECISIONS BELOW

The action of the United States District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 4089, is not officially reported. The Charge to the jury, the Verdict of the Jury and the JUDGMENT of said Court are appended hereto in the Appendix at Pages 1a, 9a and 10a, respectively. Also, the said Court's OPINION OVERRULING TWO

MOTIONS OF PLAINTIFF (for judgment notwithstanding the verdict and, in the alternative, for a new trial, but sustaining motion to alter or amend judgment as to awarding of interest) and its ORDER thereon, are appended hereto in the Appendix at Pages 11a and 17a, respectively.

The OPINION and JUDGMENT of the United States Court of Appeals for the Fifth Circuit in the aforementioned styled and numbered cause pending therein is officially reported at 448 Fed. 2d 509. Said OPINION AND JUDGMENT thereon, and the denial on PETITION FOR REHEARING are also appended hereto in the Appendix at Pages 19a and 31a, respectively.

The time for filing of this PETITION FOR WRIT OF CERTIORARI has been extended by ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI by this Honorable Court to the 4th day of March, 1972.

JURISDICTION OF THIS COURT

Judgment of the U.S. District Court for the Southern District of Mississippi, was entered on November 25, 1969. Judgment of affirmance was dated and entered by the U.S. Court of Appeals for the Fifth Circuit on August 17, 1971. Petition for Rehearing was denied on October 29, 1971.

The case presents both questions of law and of fact.

Jurisdiction of this court is conferred by Title 28, Section 1254 (1) U.S. Code, Act of June 25, 1948, C 646, (1), 62 Stat. 928, as follows:

> "Case in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon petition of any civil or criminal case, before or after rendition of Judgment or decree."

QUESTIONS PRESENTED

It has been unhesitatedly admitted by counsel for the respondent, as well as by representatives of the Internal Revenue Service, that the after-received funds were applied in such a way as to leave a deficiency in "trust fund" withholding taxes for the last quarter of 1962 and the assessment which is the basis for this law suit was made against Petitioner solely because it would be easier to collect from him than from the officers and/or the other directors of the corporation because of his better financial condition. The Internal Revenue Service made no investigation whatsoever of the facts relating to the withholding tax deficiencies existing in August of 1963 and based the entire case against Petitioner upon the single fact of his grant of a General Power of Attorney to act on behalf of the corporation in February of 1961, without any regard whatsoever for the purpose behind the Power of Attorney or the extent of its use.

On trial in the lower court, the Honorable Judge refused to allow into evidence and to submit to the jury the factual circumstances relative to the receipt by the Government of more than sufficient funds to pay the entire amount of the "trust fund" liabilities, including the real reason for the application of the funds in the manner done and excluded any evidence whatsoever as to actions taken after the Petitioner had left the corporation or representations made to him by its officers even though these actions were pertinent to a determination of the right of the Internal Revenue Service to apply the funds in the manner done or of petitioner's willfulness. Nor did the lower court place any significance on undisputed evidence by the government's own witnesses that the Government owed the corporation more money during the last quarter of 1962 than the corporation owed the Government for withheld Social Security and income taxes, that it was the President of the company who made the decisions during the period involved as to which creditors of the company should be paid and when, and that petitioner in fact had no authority with the bank to sign checks of the corporation during the last quarter of 1962. There was no evidence that he ever signed any sort of written instrument of the corporation.

The case was submitted to the jury with a Charge by the Trial Judge unequivocably stating as a matter of fact that the "trust fund" withholding taxes for the last quarter of 1962 had not been paid.

The Fifth Circuit Court of Appeals upheld the judgment against Petitioner on the grounds that the courts have taken "a broad view" of who is a person respon-

sible for collecting and paying over taxes required to be withheld from employees' wages and that Petitioner was therefore such a "responsible" person because of the authority granted in the General Power of Attorney and the fact that he had maintained a long friendship and business acquaintance with the Secretary-Treasurer of the company made that person his "right hand man" thereby somehow imputing the duty of the Secretary-Treasurer to the Petitioner. Specific evidence to the contrary was completely disregarded even though made by the Government's own witnesses and hearsay statements by one of the company's bookkeepers from which authority in the Petitioner might be somehow inferred were adopted as statements of fact in complete disregard of all the other evidence to the contrary.

The Questions Presented therefore are as follows:

1. Does the United States of America have the Constitutional right to single out an individual for assessment of penalties under Section 6672 of the Internal Revenue Code of 1954, as Amended, to the exclusion of all other parties, solely because that person appears to be financially capable rather than a "poor person" or pauper; or does the principle established in the recent case of *Gladys Boddie, et al vs. State of Connecticut*, ____ U.S., ____, 28 L. Ed. 2d 113, 91 S. Ct. ____, apply to all persons regardless of wealth?

2. Does the mere naked fact of a General Power of Attorney from a corporation in and of itself make a recipient liable for the 100% penalty for unpaid "trust

fund" withholding taxes under the provisions of Section 6672 of the Internal Revenue Codes of 1954, as Amended?

3. What are the actual standards which establish that a party is a "responsible" person under a "duty" to collect, truthfully account for, and pay over withholding taxes?

4. Does a long friendship and business association between two persons of itself impute the legal duty of one to the other as a consequence thereof?

5. What are the actual standards which constitute "willful" failure to collect, account for, and pay over withholding taxes?

6. On trial of a case, within the jurisdiction of the Federal Courts, is the United States of America subject to the same rules of evidence, including those of reasonable inferences from established facts, as is an individual person?

7. Is the question of payment of withholding taxes either by offset or by debtor director to the creditor rules, solely a question of law or a matter of fact for determination by the trier of facts?

8. If a liability for unpaid taxes should exist, does a corresponding debt from the United States of America to the party owing the unpaid taxes offset the mutual liabilities in the same manner as mutual debts offset as between private parties?

STATUTES INVOLVED

The pertinent portions of the Internal Revenue Code of 1954, as amended, Title 26 U.S. Code, Sections 3102 (a), 3402(a), 6671(b) and 6672 are set forth in the APPENDIX at pages 32a and 33a.

STATEMENT OF THE CASE

This case involves an assessment made by the Commissioner of Internal Revenue against the Petitioner, J. F. Liddon, under the Provisions of Section 6672 of the Internal Revenue Code of 1954, as amended, Title 26, USC, Section 6672, Act of Aug. 16, 1954, C 36, 68A Stat. 828, a hundred per cent penalty for "Trust Fund" withholding taxes allegedly unpaid by one Jax Construction Co. for the last quarter of 1962. A copy of the said Section is appended hereto.

It is respectfully submitted that it involves a serious question of unconstitutional discrimination against the Petitioner, as well as the unsettled questions of the extent of the authority granted the Commissioner of Internal Revenue by said Section and whether the rules of evidence applicable to proof of facts on behalf of an individual are as equally applicable in tax cases to proof of facts on behalf of the Government.

The facts are as follows. Jax Construction Co. was a Tennessee corporation which had been in existence for a number of years when in January of 1961, Petitioner, J. F. Liddon, was sold half of the shares in the corporation and made a director for the purpose

of having him lend operating monies to the corporation to conduct its business or to borrow money from lending institutions for such purpose upon the security of his personal indorsement. At that time, by resolution of the Board of Directors, he was given a general Power of Attorney to act on behalf of the corporation in all its legal and financial matters in order to facilitate the borrowings and to satisfy the request of a bank lending monies to the corporation. The evidence was uncontradicted that this was the sole intent behind the granting of the general Power of Attorney and the only purpose whatsoever for which the Power of Attorney was ever used by the Petitioner at any time whatsoever. The amount of capital stock in the company was only one thousand dollars ($1000.00) and its operating expenses required loans into the many tens of thousands of dollars. The corporation never made any profit and the only thing which Petitioner ever received from the corporation was a salary of $125.00 per week for a period of less than two years. He sold his stock in the company around the middle of January, 1963, although the actual sale, due to death of the President of the company, was delayed until the first part of February, 1963. The Petitioner was never an officer of the company nor ever occupied any position with authority to other than state how much money he could obtain for the corporation. At the time he sold his stock in the company, it owed him many times the total amount of salary ever received by him, which debt was never paid. The original resolution granting him the general Power also provided that only he and the secretary-treasurer of the corporation could sign checks on the corporation's bank account, but the evidence offered at the trial by a witness of the Government

itself proved conclusively that during the last quarter of 1962 at least, if not before, he was not authorized to sign any checks on the corporation bank account.

The corporation duly paid over withholding taxes to the Internal Revenue Service until the last quarter of 1962, when it had gotten into very serious financial difficulties. The uncontroverted proof at the trial was that the determination not to pay the withholding tax "Trust Fund" amounts during the last quarter of 1962 and the first two quarters of 1963 was made by the President of the company.

In the middle of 1963, an attorney for the corporation contacted the office of the District Director of Internal Revenue for the State of Mississippi, requesting information as to the procedure to follow in regard to the delinquent returns and payments. Immediately thereafter, acting upon information received from an Internal Revenue Service collection officer, the regular attorney for the corporation filed withholding tax returns for the last quarter of 1962 and the first two quarters of 1963 as well as an unemployment tax return for the calendar year of 1962. At the same time the collection officer was advised by the attorney that the corporation had no funds in its possession but that it had substantial amounts due it from the United States of America for the performance of Government Construction Contracts, and one other small debt, and advised the said collection officer of the location and nature of such debts in order that they might be collected and applied to any tax liabilities of the corporation and its officers and directors. The returns were filed on August 19, 1963 and the amounts due the corporation

were collected by the Internal Revenue Service a month or so thereafter. The amount of money collected from the United States Government was more than sufficient to pay all of the "Trust Fund" withholding tax amounts due for the entire period and leave a surplus to be applied against other corporate debts. According to the records of the Internal Revenue Service, however, the application of the payments was not made until some four or five months later, and they were applied first to the payment of all taxes, penalties, and interest due for the first two quarters of 1963 and the employment tax return for the calendar year of 1962 and then to penalties and interest and the amounts owed the Government by the corporation itself, leaving a net balance allegedly due for the "Trust Fund" withholding taxes amount.

This application of payments was admitted by the Internal Revenue Service officers to have been made in that manner because they had subsequently learned of the general Power of Attorney granted the Petitioner in 1961 and that he was possessed of sufficient property holdings to be in a position to pay off any assessment which the Internal Revenue Service might make against him personally and they felt that the officers and other directors of the corporation were not in such position of limited wealth. It was further admitted by the agents of the Internal Revenue Service that no investigation whatsoever was made of the actual situation surrounding the failure to make payments and file returns for the taxes withheld from employees during the last quarter of 1962 and the first two quarters of 1963 because they felt certain that the Petitioner

could be, in the common vernacular, stuck with payment of the balance. Over two years after collection of these funds and such application and over three years after Petitioner had left the employment of Jax Construction Co. and had no knowledge whatsoever of its activities other than a vague knowledge that it had gone out of business, the Commissioner of Internal Revenue made an assessment against the Petitioner J. F. Liddon, for $21,037.28 allegedly owed by him as a hundred per penalty under the provisions of Section 6672 of the 1954 Internal Revenue Code for unpaid "Trust Fund" withholding taxes of Jax Construction Co. The notice of assessment stated that it was made solely on the basis of the aforesaid general Power of Attorney granted the Petitioner in January of 1961.

Petitioner paid one small part of the assessment and filed suit for refund thereof, with the Government filing a counterclaim for the balance of the assessment allegedly due from him.

On trial, the district judge refused to allow Petitioner's Counsel to examine the Internal Revenue Service Policy Statement and Collection Litigation Bulletins on the subject of application of payments, he refused to allow the jury to know of the evidence relating to the filing of the delinquent returns and the notification to the Internal Revenue Service of monies due the corporation with which the taxes might be paid and the fact that the Government owed the corporation considerably more money than was owed by the corporation to the Government at the time; and despite the uncontradicted evidence that Petitioner had neither any authority in the selection of debts to be paid by

the corporation during the period involved nor the right to draw checks on the corporation's bank account to pay the same, that the purpose for and use to the Power of Attorney granted Petitioner was solely to borrow monies for the corporation that the Government introduced no evidence whatsoever to show that Petitioner had ever at any time whatsoever signed any written instrument of any sort whatsoever on behalf of or for the corporation, that Petitioner had been informed and believed that the withholding taxes for the last quarter of 1962 had been paid by the corporation in January of 1963 and that according to his personal knowledge the 31st day of January was the date they were due to be paid, the judge permitted the jury to consider hearsay evidence of a bookkeeper contradicting the Government's own witness, the Secretary-Treasurer of the company without instruction to disregard the same and finally gave instructions to the jury tantamount to a direction by the Court that the jury find for the Government that Petitioner was a responsible person under a duty to collect, account for, and pay over the withholding taxes, stating as a matter of fact that the "trust fund" taxes for the last quarter of 1962 had not been paid although this was one of the factual points at issue.

On appeal, the United States Court of Appeals for the Fifth Circuit, with a slight modification in favor of the Government as to the interest issue, on the grounds that as summarized in a recent annotation in 22 ALR 3d 850, the courts have taken a "broad view" of who is a person responsible for collecting and paying over withheld taxes, that he was a person with ultimate authority over expenditures of corporate funds"

because of the statements contained in the resolution granting the General Power of Attorney and that his failure to pay over the withheld taxes was "willfull" solely because he knew that funds were going in and out of the corporate checking account without the taxes being paid. Evidence introduced by the government's own witnesses showing conclusively that Petitioner was not authorized to sign checks on the corporate banking account during the last quarter of 1962 was flatly ignored, the court stating that the only persons who could sign checks were Petitioner and "his right hand man", the Secretary-Treasurer of the corporation, with whom Petitioner had been associated in business for some 5 years previous. The uncontradicted testimony of two of the government's own witnesses that the president of the corporation was the person who made all decisions as to which creditor should be paid and when, during the period involved, was also ignored. Nor was any significance placed on the fact that no evidence of any sort whatsoever was introduced to show that Petitioner ever at any time whatsoever had anything to do with the collection or payment of withheld taxes, or that he ever signed any check or other written instrument of any sort whatsoever pertaining to the corporate business.

The appeals court took no note of the uncontradicted testimony that Petitioner himself understood that the withheld taxes were not due to be paid until the end of January and that he had been informed by corporate officials that the taxes for the period involved had been paid. Nor did it take any cognizance of the testimony of the government's witness that the government

owed the corporation considerably more money during the period involved than the corporation owed the government and did not even discuss the issue of "offset" of mutual debts. It also ignored the evidence that checks drawn in payment of the corporate debts at the direction of the president of the corporation were mailed prior to the receipt of funds by the corporation and the corporation had a constant overdraft during the period involved.

The court also upheld the ruling of the lower court that the withheld taxes had not been paid "as a matter of law", and stated flatly that no request or direction to apply the after-received funds in any particular manner had been made, without in any way attempting to explain why the Internal Revenue Service had been contacted regarding the amounts due the corporation and the delinquent returns or for what reason the representatives of the corporation had gone to so much trouble to inform the Internal Revenue Service of the amounts due. In fact, the opinion of the appeals court simply constituted a rubber stamp of the actions taken by the trial court.

It is respectfully submitted that upholding this case would open the gate to assessment of the 100% penalty for failure of a corporation to pay withheld taxes against anyone and everyone connected with a delinquent corporation no matter how tenuous the connection and would make a mockery of the commonly accepted meanings of the words "duty" and "willfully" contained in the statutory definition of a person responsible for collecting and paying over such taxes

and the fundamental basis for liability under the penalty statute.

REASONS FOR GRANTING OF WRIT

The decision below should be reviewed because there appears to be hopeless conflict between the decisions of the various Circuit Courts of Appeal and District Courts on the issues of duty and wilfulness.

The Fifth Circuit Court of Appeals, while giving lip service to the ultimate "power and responsibility" rule laid down in *United States v. Graham, 9 Cir. 1962, 309 F.2d 210, 212;* and *Monday v. United States, 421 F.2d 1210, 1214, 1215,* seems to place the same upon practically anyone connected with a corporation. On the other hand, many decisions have held that the mere fact that a person is a substantial, or even majority stockholder, a director, an employee or even one authorized to act as a general agent for a corporation does not in and of itself make that person one responsible for collecting, accounting for, and paying over the employment taxes, *Gordon v. Evans,* F. Supp., 62-1 USTC Par. 9196 (DC Nev. 1961); *Lauringer v. Scanlan,* 65-1 USTC Par. 9336 (DC ED N.Y. 1965); *Campbell v. Nixon,* 207 Fed. Supp. 826, 62-2 USTC Par. 9681 (DC ED Mich. May 62); *U. S. v. Berman,* 65-2 USTC Par. 9722 (DC Fla. 1965), where the president of the corporation was held not a responsible person for the reason that he did not designate what creditors were to be paid, was not the disbursing officer of the corporation, did not perform the function or have the duty of preparing tax returns, collecting the taxes or paying

them over, and during the same period of time was also employed by two other corporations; *Cellura v. U. S.*, 245 F. Supp. 379, 65-2 USTC Par. 9635 (DCND Ohio ED 1965); *Petrie v. U. S.*, 62-2 USTC Par. 9600 (DCND Ga. 1962).

Section 6671 (b) of the Internal Revenue Code of 1954 defines a person responsible for collecting, accounting for, and paying over taxes withheld from the employees of a corporation as one who is "under a duty" to do so.

As stated in *Wiggins v. U.S.*, 188 Fed. Supp. 374, 376, 60-2 USTC Par. 9716 (DCED Tenn. 1960):

> "The statute is directed at the person charged *with the duty* of collecting and paying the taxes *and not simply one who may have authority to do so.*" (Emphasis furnished)

Nor does the Fifth Circuit Court of Appeals seem to give adequate consideration to the question of the rule relating to reasonable cause as evidencing a lack of "wilfully" failing to perform the duty, although other jurisdictions have made extensive use of it. For example, it has been held that evidence showing the taxpayer to have a reasonable expectation of anticipating payment of the withheld taxes by funds to be received from a specific source negated any wilful failure to pay such taxes, as in *Arnason and Meyer v. U.S.*, 68-1 USTC Par. 9419 (DC N.Dak. SD 1968) where the expectant fund was a potential profit to be made for the sale of houses under construction; and *McCarty*

Jr. v. U.S., Court Claims No. 229-62, 1/29/70, 707 CCA, Standard Fed. Tax Reports Par. 7906 (Court of Claims 1970), where the expectant fund was monies to be derived from sales to the U. S. Navy; and *Clark v. U.S.A.*, 58-1 USTC Par. 9314 (DC E.Dist. Wash. No. 1958), where the expectant fund was monies to be derived from the sale of accumulated inventory, which in fact did not exist after concentrated examination. Furthermore, honest belief on the part of a taxpayer has been considered relevant as to the question of wilful. *Haigler v. U.S.*, 172 Fed. 2d 986, 49-1 USTC Par. 9171 (CCA 10 1949); *Grayline Co. v. Granquist*, 237 Fed. 2d 390, 56-2 USTC Par. 9973 (CCA 9 1956), Cert. Den. 353 U.S. 911 (1957); *U.S. v. Leuschner, Sr.*, 336 Fed. 2d 246, 64-2 USTC Par. 9742 (CCA 9 1964).

In addition, it is respectfully submitted that the question of off-set of mutual liabilities between the government and the corporation as in fact and law prohibited a claim that the withheld taxes had not been paid by the corporation should be ruled upon.

It is a basic requirement for assessment under Sec. 6672, IRC of 1954, 26 USC Sec. 6672, that the corporation have failed to pay the withheld taxes, *Kelly v. Lethert*, 362 F. 2d 629, 66-2 USTC Par. 9509 (CCA 8 1966); *Crompton v. Richmond Co. v. U. S.*, 273 F. Supp. 219, 67-2 USTC Par. 960. (S.D. N.Y. 1967), and where such mutual liabilities exist, the taxpayer should have the same right to set-off as have existed in favor of the government. In *47 Am. Jur. SetOff and Counter-Claim, Sec. 18*, it is said:

> "The right of setoff generally, defenses arising from counterclaims, and even any equitable defense growing out of the same transaction are freely open to defendants sued at law in Circuit Courts of the United States."

And see *Cherry Cotton Mills, Inc. v. Comm.*, 327 U.S. 536, 46-1 USTC Par. 9218 (S. Ct. 1946); *Frank Luther v. U. S.*, 225 F. 2d 495, 54-2 USTC Par. 9636 (CCA 10 1954), where held that mere fact that the amount of the liability of the taxpayer to the government was not certain did not deprive the government of the right of setoff.

Furthermore, the Comptroller General of the United States ruled in Comptroller General's Decision B-95362, September 11, 1950 (505 CCH-Standard Federal Tax Reports Par. 6219), in a matter involving withholding tax liabilities arising in connection with a contractor performing under a government contract that:

> "Inasmuch as setoff is essentially an equitable remedy based upon the principle that natural justice requires the simultaneous adjustment between parties of their mutual debts, you are advised that the contract balance should be set off as of the date it became due."

even though part of the tax liability of the contractor accrued after the government had received notice of the assignment to a third party of proceeds due the contractors under the federal contract.

Furthermore, it is respectfully submitted that the question of direction of application of funds by the debtor to the creditor being one of law or of fact should be clarified.

It is hornbook law that the rule relating to the application of payments by a creditor to specific debts owed the debtor is only that the debtor "at or before the time of payment or performance, manifests to the creditor an intention to have it so applied". And a manifestation of intent does not necessarily require express words, or even any words at all, but may be shown simply by circumstances surrounding the payment from which such an intention might reasonably be inferred. (*Restatement of the Law, Contracts,* ALI, Sec. 387 et seq., *American Jurisprudence Second, Contracts.* Sec. 3-4.) and inference from circumstances should, it would seem, be resolved by the trier of facts rather than decided as a matter of law by the court itself.

All of these questions are recurring ones and need positive definition and clarification in order that taxpayers may know what to do. Such definement can come only from a ruling of this Honorable Court itself.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this WRIT OF CERTIORARI should be granted.

L. LAMAR BEACHAM

COUNSEL FOR
PETITIONER

CERTIFICATE

The undersigned counsel of record for the Petitioner, J. F. Liddon, hereby certifies that a true copy of the foregoing Petition for A Writ of Certiorari has been this date forwarded by United States Mail, postage prepaid, to the Honorable Robert E. Hauberg, Room 407, Federal Building, Jackson, Mississippi, and to the Honorable Charles M. Merkel, Tax Division, U.S. Department of Justice, Washington, D.C. 20530, Attorneys for Respondent, United States of America.

This the ____ day of March, 1972.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. F. LIDDON,

Plaintiff,

versus

CIVIL ACTION
No. 4089

UNITED STATES OF AMERICA,

Defendant.

CHARGE TO THE JURY

BY THE COURT:

Ladies and gentlemen of the Jury, you have now heard all of the testimony in this case and you have heard the argument of counsel on both sides. The Court will now instruct you as to the law which you will use and apply to the evidence as you find it in reaching your verdict. I invite your very careful attention to these instructions for in the Federal Court these instructions are given by the Court orally. In the state court they are usually given in writing and you take those instructions to your Juryroom and look them over and read them and discuss them, but in the Federal Court these are the only instructions you'll get as to the law and they are given to you orally at this time so I want you to pay careful attention to them.

And again I want to state to you that in Federal Court in a case such as this it takes twelve jurors to agree in order to reach a verdict, so all twelve of you will have to agree in order to reach a verdict. And although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law regardless of any opinion you may have had as to what the law ought to be. It would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court. This case like any other is to be decided by you fairly and calmly with careful, honest, and conscientious consideration given to the evidence admitted under the rulings of the Court during the course of this trial. You are expected to use your good sense and consider the evidence in the case only for those purposes for which it has been admitted, and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings. In weighing the credibility of the witnesses and the weight to be given their testimony, you should give the testimony of each witness careful scrutiny. Consider all of the circumstances under which he or she testifies, his or her appearance and demeanor while on the witness stand, his or her apparent candor and fairness or lack thereof, the reasonableness or unreasonableness of his or her story, the

interest if any that he or she might have in the outcome of the case and the motive prompting the testimony, the extent to which he or she is corroborated or contracted by other credible evidence, and in short, members of the Jury, any circumstances which tend to shed light upon the believability of the witness. Do not let bias, prejudice, sympathy, resentment or any such emotion play any part in your deliberations and do not speculate on matters not shown by evidence. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in this case.

This suit was brought by the plaintiff to recover a portion of a sum of taxes which the plaintiff alleges were illegally assessed against him for his wilful failure to cause Jax Construction Company to pay the government Federal income and social security taxes withheld from the wages of one employee for the last quarter of 1962, October 1st through December 31st of 1962. And the government filed counter-claim for the full amount of the taxes assessed, less credit for the portion paid, as a penalty pursuant to the provisions of Section 6672 of the Internal Revenue Code based upon plaintiff's alleged responsibility as a stockholder and director of said corporation to pay such taxes. And the plaintiff claims that his activities with and on behalf of the corporation were not such as to make him a person required to be responsible for the collection and payment of the taxes within the meaning of Section 6672. The government says that he is. At the outset I want to point out to you that this lawsuit is strictly a civil action. Although the word 'penalty'

has been used throughout the course of the trial this is not a criminal case and the government in no way claims that Mr. Liddon is guilty of any crime. The law requires an employer to withhold from the wages paid to his employees Federal income taxes and social security taxes. The amount withheld is to be kept as a special trust fund by the employer for the benefit of the United States and for the purpose of paying these withheld taxes. Sometimes, as occurred in this case, the employer fails to pay the withheld taxes to the government. At all times pertinent to this action there were in full force and effect the following sections of the Internal Revenue Code: Section 3102(a) of the Internal Revenue Code provides the tax imposed by Section 3101, which is the Federal Insurance Contributions Act or social security, shall be collected by an employer of the taxpayer by deducting the amount of the tax from the wages as and when paid. Section 3402(a) of the Internal Revenue Code provides that every employer making payment of wages shall deduct and withhold upon such wages and then the Federal income tax. And under Section 7501(a) of the Internal Revenue Code provides that whenever any person is required to collect or withhold any Internal Revenue tax from any other person and to pay over such tax to the United States the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such funds shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations, including penalties, as are applicable with respect to the taxes from which such fund arose. Then under Section 6672 of the Internal Revenue Code provides any person required

to collect, truthfully account for, and pay over any tax imposed by this title who wilfully fails to collect such tax, or truthfully account for and pay over such tax, shall in addition to other penalties provided by law be liable to a penalty equal to the total amount of the tax not collected or not accounted for and paid over. And under Section 6671(c) of the Internal Revenue Code the term 'person' as used in this sub-chapter includes an officer or employee of a corporation who as such officer or employee is under a duty to perform the act in respect of which the violation occurred.

You are instructed that the Commissioner of Internal Revenue is charged with the duty and the power by law of assessing internal revenue taxes of the United States. When an assessment is made by the Commissioner it is presumed to be correct until the plaintiff proves by a preponderance of the evidence that the assessment is incorrect. That is, the plaintiff has the burden of proof that the assessment was incorrect by a preponderance of the evidence. The plaintiff is at liberty to show that he was never a responsible person and that if he was that he never acted wilfully. He may show that he was a responsible person only part of the time or that he acted wilfully only during a part of the period. The plaintiff may thus overthrow entirely or in part the assessment. The Plaintiff Liddon would be entitled to a refund if he establishes by a preponderance of the evidence either that he was not a person required to collect, truthfully account for and pay over the withholding taxes of Jax Construction Company for the period October 1st through December 31st, 1962, or that if he was not — or that if he was such a respon-

sible person that he did not wilfully fail to collect, truthfully account for and pay over such tax.

The employer in this case was a corporation and as such can only act through its officers, directors and employees. Every corporation which is an employer must have some person who has the duty or responsibility of withholding and paying over those taxes which the law requires to be withheld and paid over to the government. There may be more than one such person — responsible person — but there must be at least one. There may be more than one person liable for this 100% penalty imposed by Section 6672 of the Internal Revenue Code. If the Plaintiff was a responsible person required to collect, account for and pay over these taxes the fact that he may not have been the only responsible person would not excuse him from his responsibility of paying over the tax to the government. The penalty statute refers to "any" person required rather than to "the" person required. It includes all those who are so connected with the corporation as to be a responsible person for collecting, truthfully accounting for, and paying over these taxes to the government. In that connection, if you find that there were other officers, directors, agents or employees of the corporation in addition to Plaintiff who had a duty to perform these acts, the failure of such other persons does not excuse Plaintiff for his failure to do so. However, if you find that such other person or persons were responsible to the exclusion of the Plaintiff, the Plaintiff would not be a responsible person. The term 'responsible person' includes any person so connected with a business as to be in a position to exercise

full authority over its financial affairs, or has authority to make final decisions concerning the business, or to determine which creditors are to be paid and when. It is not necessary that he be the disbursing officer who actually prepares the payroll checks or the tax returns for the corporation, or that he be authorized to draw checks for the corporation so long as he has the power to determine who will receive such checks. The term 'wilfully' as used in Section 6672 of the Internal Revenue Code means that the act of failure to pay over the taxes was done voluntarily, consciously, intentionally, or without reasonable cause. If a responsible person consciously, voluntarily, intentionally, or without reasonable cause uses or knowingly causes these trust funds to be used for purposes other than payment of taxes, he is deemed to have acted wilfully. It is not necessary for you to determine that plaintiff had an intent to defraud or to deprive the United States of the taxes, nor is it necessary that bad motives or wicked designs be shown on the part of plaintiff. Additionally, if a responsible officer who has knowledge that withholding and social security taxes are owing to the government, pays net wages to the corporate employees, i.e., their gross salary, less withholding and social security, when the corporation does not have adequate funds to pay the taxes and when at a later time the corporation obtains the funds but uses them to pay other creditors, the conduct of the responsible officer is wilful regardless of whether he ultimately intended to evade or avoid payment.

The term 'preponderance of evidence' as used in this charge means the greater weight or degree of credible

evidence in the case. It does not necessarily mean the greater number of witnesses or the presentation of the greater number of documents. It is the quality of the evidence and not the quantity of the evidence that is important. The Jury, you, is the exclusive judge of the credibility of the witnesses and the weight to be given their individual testimony. There has been testimony in this case of the sale of the stock of J. F. Liddon to a Mr. Rosenbaum, but the fact that Mr. Rosenbaum may have purchased Mr. Liddon's stock in Jax Construction Company with knowledge of the taxes which were due and unpaid has no effect upon Mr. Liddon's duty to see that such taxes were paid if he was a person responsible for such payment.

Bearing in mind the foregoing instructions you will return herein an answer to the following special issue, to-wit (and I am going to give this in a form to you as the form of your jury verdict on a separate sheet of paper). The special issue is this: "Do you find from a preponderance of the evidence that the plaintiff, J. F. Liddon, was a responsible person required to collect, truthfully account for, and pay over the withholding and Federal Insurance Contribution Act — or social security taxes — of Jax Construction Company, and that he wilfully failed to collect, truthfully account for, and pay over such taxes to the United States for the period October 1st to December 31st, 1962, or for any part of this period?" And there is a line there for your answer 'yes' or 'no'. It's just that simple this case is.

You are instructed that Plaintiff, J. F. Liddon, has the burden of proof that he was not a responsible person required to collect, truthfully account for, and pay over the taxes inquired about, or that he did not wilfully fail to collect, truthfully account for, and pay over such taxes to the United States.

APPENDIX B

JURY VERDICT

SPECIAL ISSUE No. 1:

Do you find from a preponderance of the evidence that the Plaintiff, J. F. Liddon, was a responsible person required to collect, truthfully account for, and pay over the withholding and Federal Insurance Contribution Act (social security) taxes of Jax Construction Co., and that he willfully failed to collect, truthfully account for, and pay over such taxes to the United States, for the period October 1, through December 31, 1962, or for any part of this period?

ANSWER YES

"YES" OR "NO"

APPENDIX C

JUDGMENT

THIS CAUSE coming on to be heard and came the parties in person and by counsel and announced ready for trial; whereupon came a jury composed of Cyrus A. Clarke, Jr., and eleven other good and lawful jurors, duly elected, empaneled and sworn to try the issues first joined; and the Court having heard all of the testimony and received all of the evidence, the jury retired under proper instructions of the Court to consider of their verdict and presently returned into open court the following verdict, to-wit:

"*SPECIAL ISSUE No. 1:*

"Do you find from a preponderance of the evidence that the plaintiff, J. F. Liddon, was a responsible person required to collect, truthfully account for, and pay over the withholding and Federal Insurance Contributions Act (social security) taxes of Jax Construction Co., and that he willfully failed to collect, truthfully account for, and pay over such taxes to the United States, for the period October 1 through December 31, 1962, or for any part of this period?

ANSWER: *YES.*",

which said verdict was duly received, entered and filed in open court as the verdict of the jury.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the Court that J. F. Liddon, as plaintiff, do have of and recover nothing from the United States of America, as defendant. IT IS FURTHER ORDERED

AND ADJUDGED by the Court that the United States of America, as counterclaimant, do have and recover from J. F. Liddon, as defendant to the counterclaim, the sum of $21,014.94, with 6% interest thereon from January 7, 1966, and all costs of this suit, to be taxed by the Clerk of this Court under the rules of the Court, and for all of which proper process may issue.

ORDERED AND ADJUDGED this the 26th day of September 1968.

/s/ Dan M. Russell, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. F. LIDDON,

Plaintiff,

versus Civil Action No. 4089

UNITED STATES OF AMERICA,

Defendant.

OPINION OVERRULING TWO MOTIONS OF PLAINTIFF

This matter is before the Court on two post-trial motions filed by plaintiff — (1) motion for judgment not-

withstanding the verdict or, in the alternative, motion for a new trial, and (2) motion to alter or amend judgment. Both motions were timely filed following a jury verdict in favor of defendant on September 25, 1968, and entry of judgment on the following day, but were only recently submitted to the Court on briefs. Both motions are dealt with in this opinion.

This suit grew out of the assessment of a penalty against plaintiff as a person responsible for the payment of federal withholding and social security taxes (trust funds) collected by Jax Construction Company from its employees from October 1, 1962 through December 31, 1962, by virtue of internal revenue laws, Section 6672, Title 26 U.S.C.A. In order to resolve the matter, plaintiff paid a token assessment in the sum of $22.34, filed his suit against the government for its return, the government answered and counter-claimed for the full amount of $21,037.28, thereby putting the controversy in issue. On a trial to a jury, a verdict was brought in for the government finding that plaintiff was such a responsible person who willfully failed to collect and pay the corporation's taxes to the government and a judgment was rendered against him accordingly.

In his motion for a judgment notwithstanding the verdict R-110 plaintiff contends (1) the evidence showed that the Internal Revenue Service collected from another government agency enough funds due the corporation on a construction contract to discharge the corporation's trust fund liabilities for the pertinent period and by setting off these funds against other cor-

porate tax liabilities instead of against the trust fund liabilities was guilty of a misapplication of the funds, thereby rendering the 100% penalty assessment illegal; (2) the government failed to prove there were sufficient funds under the control of the plaintiff during the pertinent period which could have been applied to satisfy the trust fund liabilities; (3) the evidence did not warrant a finding that plaintiff was a responsible person within the meaning of Section 6672; and (4) the evidence failed to show that plaintiff willfully failed to collect, or truthfully account for and pay over the aforesaid withholding and social security taxes.

In a pre-trial order, the parties agreed that the above listed grounds presented mixed issues of law and fact to be resolved at the trial.

As to the first ground, plaintiff correctly stated the law as embodied in Section 387, Restatement of Contracts, that where more than one debt is owed to the same party, payments received from the debtor are to be applied as the debtor, at or before the time of payment, manifests to the creditor an intention to have it apply. In order to apply this rule to the circumstances of this case, plaintiff undertook to show that a Yazoo City attorney for Jax Construction Company's officers and directors, together with a Jackson attorney, contacted an internal revenue official in connection with the corporate returns which were in default, and advised said officials of hold-back funds due the corporation, all in an effort to prevent penalty assessments against the officers and directors. This testimony was heard by the Court both out of the presence of the jury and in the jury's presence. The internal

revenue official, testifying for plaintiff as an adverse witness, stated he remembered a telephone call on a Saturday afternoon from one of the attorneys and an office conference relative to the fact that the corporate returns had not been filed and that certain hold-back funds belonging to the corporation were available to apply against delinquent taxes. He did not recall any requests or directions that said funds be so applied as to avoid possible penalties against responsible corporate officials. At the conclusion of the plaintiff's case, the Court ruled as a matter of law that there had been a failure of proof that any request had been made on behalf of the *corporation* as to how its assets should be applied to its various delinquencies. On view the Court does not find any error in its ruling. See syllabus (7) in *Hewitt v. U.S.*, 377 F.2d 921: "In absence of any agreement, direction or request, Internal Revenue Service had right to apply funds of corporation as it saw fit to federal income and social security taxes which corporation had withheld from employees, and taxpayer, who had been president of corporation, but who had severed his connection with corporation, and on whom United States imposed liability for penalty under Internal Revenue Code for failure to collect and pay over tax, had no right to direct that Internal Revenue Service apply payment for first instead of second quarter of year." Also see *Datlof v. U.S.*, 252 F. Supp. 11. The Court accordingly finds no merit on this ground.

The succeeding three grounds all involve issues of fact which were presented to the jury in a full trial

and resolved by the jury adversely to plaintiff. The burden of proof was on the plaintiff (*Berman v. Scanlon*, 277 F. Supp. 646), which the jury obviously found he had not met. The Court finds no valid reason for overturning the findings of the jury.

As to the various reasons assigned for plaintiff's alternative motion for a new trial which concisely are that the verdict was contrary to the law and the evidence, the Court notes that evidence was offered showing that there were corporate funds on hand in the sum of $30,000.00 on December 14, and $24,000.00 on hand on December 15, 1962, to meet the corporate tax obligations for the last quarter of 1962, and that plaintiff's duties on behalf of the corporation while he was a stockholder, were such that a jury could determine from their characterizations that plaintiff was a person required to collect, account for, and pay over such taxes on behalf of the corporation, and that he willfully failed to do so within the purview of the statute. The jury was instructed that the action was civil; not criminal and that "willfully" as used in a civil case means that the failure to pay the taxes was done voluntarily, consciously, intentionally and without reasonable cause. See *Frazier v. U.S.*, 304 F. 2d 528.

At the conclusion of the charge to the jury, the plaintiff took no exceptions to the instructions given by the Court and asked for no additional instructions. The only instructions refused were those on behalf of the defendant.

As to plaintiff's motion to alter or amend the judgment to deny recovery of 6% interest on the penalty

from January 7, 1966, to date of judgment, the Court is of the opinion that this motion is well taken.

Defendant in its counterclaim asked for judgment against plaintiff in the sum of $21,014.94, plus interest allowable at law. Sec. 6601 (f) (3) provides that interest shall be imposed in respect of any assessable penalty if such penalty is not paid within 10 days from the date of notice. The judgment itself awarded to the government the sum of $21,014.94, with interest at 6% from January 7, 1966. Notwithstanding the above, no question as to the recovery of interest was raised in either the pre-trial order or during the trial, as defendant concedes. Although the amount of the penalty was before the jury, at no time was the jury advised of the date of notice or a computation of interest due. No instruction was requested or given to the jury as to the date of notice or amount of interest, and, the verdict being in the form of an answer to special issues raised, contained no finding as to the date of notice, from which interest could be computed.

Defendant's response to plaintiff's motion is an affidavit of an internal revenue service official certifying that an attached sheet is a true copy of its ledger sheet with symbols thereon indicating the dates of certain notices. As it was the burden of the government, in claiming interest, to show the date from which interest should have been computed, the court finds that such evidence should have been proffered during the trial, with the right of plaintiff to contest, and that its proffer after trial is not timely.

In view of the above, the Court overrules plaintiff's motion for a judgment notwithstandiig the verdict and the alternative motion for a new trial. The Court sustains the motion of the plaintiff to alter or amend the judgment by deleting the award of interest from January 7, 1966, to date of judgment. Interest is assessed from date of judgment until paid, as well as costs.

An order to this effect may be submitted.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

DATED: Nov. 24, 1969

APPENDIX E

(TITLE OMITTED — FILED NOV. 25, 1969)

ORDER

This action came on for hearing on two post-trial motions filed by the plaintiff:

(1) Motion for judgment notwithstanding the verdict, or, in the alternative, motion for a new trial.

(2) Motion to alter or amend judgment.

The Court has rendered an Opinion in writing on said motions dated November 24, 1969 and filed in the record of this cause.

Implementing the provisions of said Opinion, the provisions of which are incorporated herein by reference, it is ordered that the plaintiff's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial is hereby overruled and the prayer thereof is denied.

It is further ordered that the plaintiff's Motion to Alter or Amend Judgment of this Court dated September 26, 1968 and entered on September 27, 1968 is sustained, and said judgment is hereby altered and amended nunc pro tunc by deleting therefrom the award of interest on the sum of $21,014.94 at six per cent per annum from January 7, 1966 to September 26, 1968, the date of said judgment. Notwithstanding the deleting of said prejudgment interest, said judgment shall bear interest at the rate of six percent per annum from and after the date of judgment.

ORDERED this 25th day of November, 1969.

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29373

J. F. LIDDON,
Plaintiffs-Appellant-
Cross Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Southern District of Mississippi

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(August 17, 1971)

Before RIVES, THORNBERRY and COLEMAN, Circuit Judges.

RIVES, Circuit Judge: This appeal and cross-appeal are from a judgment that the United States recover from Liddon the sum of $21,014.94 with 6% interest from and after the date of the judgment, September 26, 1968. The judgment was based on a special verdict which we quote:

"SPECIAL ISSUE NO. 1:

"Do you find from a preponderance of the evidence that the Plaintiff, J. F. Liddon, was a responsible person required to collect, truthfully account for, and pay over the withholding and Federal Insurance Contribution Act (social security) taxes of Jax Construction Co., and that he willfully failed to collect, truthfully account for, and pay over such taxes to the United States, for the period October 1, through December 31, 1962, or for any part of this period?

"ANSWER YES

'YES' OR 'NO'

"We, the Jury have answered the above and foregoing special issue, as above indicated, and herewith return the same into court as our verdict.

[Signed by all twelve jurors]

DATED: Sept. 25, 1968"

The verdict and judgment are for the 100% penalty assessed against Liddon, under 26 U.S.C. § 6672, as a responsible "person" who willfully failed to pay over the portion of withholding and social security taxes collected by Jax Construction Company from its employees in the amount of $21,037.28 for the fourth quarter of 1962. As originally entered, the judgment

included interest from January 7, 1966, the date of the assessment of penalty. The district court granted Liddon's post-trial motion to alter or amend the judgment by deleting the pre-judgment interest and providing for interest from the date of the judgment.

On appeal Liddon contends: (1) that he was entitled to a directed verdict or to judgment notwithstanding the verdict because, (a) the evidence established that he was not a responsible person required to pay over the portion of the withholding and social security taxes collected from Jax's employees, and (b) the evidence further established that Liddon's failure to pay over such taxes to the United States was not willful; (2) that the district court should have held as a matter of law that the withheld taxes for the last quarter of 1962 had been paid by the corporation or, in the alternative, should have submitted that issue to the jury; and (3) that the district court erroneously instructed the jury on burden of proof and on the meaning of "willfully." We find no merit in any of Liddon's contentions and affirm on his original appeal.

The Government's cross-appeal challenges the amendment to the original judgment which deletes pre-judgment interest. In the alternative, the Government insists that interest should be calculated from April 13, 1967, the date the Government's counterclaim was filed. We hold with the Government on its alternative contention and modify the judgment accordingly.

Liddon's Appeal.

1(a). The district court refused to direct a verdict for either party. The evidence established without dispute that Jax Construction Company had collected but had failed to pay over to the Government the employees' portion of withholding and social security taxes in the amount of $21,037.28 for the fourth quarter of 1962. As indicated by the special verdict, the district court submitted to the jury two issues — (1) whether Liddon was a responsible "person" required to pay over the taxes and (2) whether he "willfully" failed to do so.

Liddon had been in the automobile business all of his adult life. In 1961 he held the Chevrolet franchise in Yazoo City, Mississippi. Because of certain health problems, he became interested in taking a less active part in business. A friend persuaded him to invest in Jax Construction Company, a corporation to be organized to engage in the business of "pole line" construction for electrical power lines.

Liddon was to furnish or obtain most of the financing for the corporation. From the organization of the corporation in 1961 until Liddon sold his interest in early February 1963, Liddon was a 50% shareholder and director of the Jax Construction Company. In early 1962 he also became an employee and thereafter drew a salary of $125.00 per week. Liddon's duties related primarily to inspection and purchasing of equipment, renovating and building an office, and financing or securing financing for Jax Construction Company and

its affiliate, Mississippi Utilities Equipment Company. He personally endorsed loans made to Jax Construction Company.

At the suggestion of his banker, he had a resolution adopted at the first meeting of the Jax Board of directors in January 1961, authorizing him to execute contracts, arrange loans, sign checks, draw on corporate funds, pay debts and affix the corporate seal to all contracts and agreements. Liddon and J. C. Williams, the secretary-treasurer, were the only persons at the home office vested with authority to sign checks or make withdrawals from the corporate bank account. Actually, Liddon signed few, if any, checks.

Williams attended to almost all of the check signing, functioned as office manager and supervised the work of two clerical assistants. Williams had been associated with Liddon for about five years and was employed by him as the bookkeeper at his Chevrolet dealership. Liddon hired Williams to work at Jax upon its inception and Williams left Jax's employ in March of 1963, a month after Liddon sold his interest.

Liddon's contention that he was not a "responsible person" required to withhold and pay over the taxes is based upon 26 U.S.C. § 6671(b), which defines a responsible "person" as including an officer or employee of a corporation who "is under a duty" to correct and pay over the tax. Liddon's counsel emphasizes the word "duty."

That contention overlooks the basic purpose of the so-called penalty imposed by section 6672. As this Court

has heretofore noted, that purpose is simply to provide a remedy to prevent the unnecessary loss of tax funds. *Newsome v. United States*, 5 Cir. 1970, 431 F.2d 472, 745.

A similar contention was answered by the Ninth Circuit, as follows:

> "Graham next contends that he was not a person under § 6672 'required to collect, truthfully account for, and pay over' the taxes in question, since he was not a disbursing officer of the corporation and had no authority to draw or sign checks on the corporation's bank account.
>
> "This again, we feel, is too narrow a construction. The statute's purpose is to permit the taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing. It would make little sense to confine liability to those performing the payment when such functions are performed simply in accordance with the executive judgment of others whose duty it is to decide for the corporation in this area."

United States v. Graham, 9 Cir. 1962, 309 F.2d 210, 212.

Likewise, the Seventh Circuit in *Monday v. United States*, 421 F.2d 1210, 1214, 1215, said:

> "Corporate office does not, *per se*, impose the duty to collect, account for and pay over the withheld taxes. On the other hand, an officer may have such a duty even though he is not the disbursing officer. [Citations omitted.] The existence of the same duty and concomitant liability in another official likewise has no effect on the taxpayer's responsibility. [Citations omitted.] Liability attaches to those with power and responsibility within the corporate structure for seeing that the taxes withheld from various sources are remitted to the Government. [Citations omitted.] This duty is generally found in high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds. [Citations omitted.]"

A recent annotation in 22 A.L.R. 3d 8, 50, well summarizes the holding of the courts.

> "The courts have taken a broad view of who is a person responsible for collecting and paying over taxes required to be withheld from employees' wages. Although the mere holding of corporate office does not of itself make for personal liability on the part of the officer, liability for the penalty is not confined to 'disbursing officers' or officers with authority to draw or sign checks.

> "In reaching a determination with respect to the person or persons upon whom to impose responsibility and liability for the failure to pay taxes, the courts have tended to disregard the mechanical functions of the various corporate officers, and, instead, have searched for the person or persons who could have seen to it that the taxes were paid, a person with ultimate authority over expeditures of corporate funds who can fairly be said to be responsible for the corporation's failure to pay over its taxes." (Citations omitted.)

There is ample evidence to support the jury's verdict that Liddon was a responsible "person." He was one of two corporate agents at its home office who could sign checks, and the other was his righthand man.

1(b). Liddon was fully aware that the taxes were not being paid, while funds were flowing in and out of the corporate checking account. He admitted that there was no failure to pay his own salary or the salary of any of the other corporate employees. Jax's bookkeeper testified that Liddon decided when and what corporate debts should be paid. Apparently those were paid which were necessary to keep the business operating. That system overlooks the fact that the taxes withheld from the employees' wages are held by the corporation as a special fund in trust for the United States. *Newsome v. United States, supra.*

To establish that the jury could properly find that Liddon's failure to pay over the withheld taxes was "willful," we need only mention that in *Newsome v. United States, supra,* 431 F.2d at 746, we held that when the responsible person knows that the withheld funds are being used for other corporate purposes (regardless of his expectation that sufficient funds will be on hand for payment over to the Government), and thus voluntarily and consciously risks the withheld taxes in the operation of the corporation, he does so at his peril and subjects himself to liability under section 6672 if the corporation is unable to remit the withheld taxes.

(2). About a year after Liddon severed his connection with Jax Construction Company, the Internal Revenue Service collected by levy certain assets of the corporation and applied the funds toward various delinquencies, including some of its liabilities for the fourth quarter of 1962. Most of the funds were applied toward direct tax liabilities of the corporation rather than taxes which had been withheld from wages of employees. Liddon claims that this collection constituted a payment by the corporation of the trust fund taxes for the fourth quarter of 1962 and that the district court erred in failing to so hold. Instead, the court ruled as a matter of law that the funds so collected did not constitute a payment of withheld taxes.

Jax's attorney had informed the Internal Revenue Service of the corporation's liabilities when he filed the returns, and had advised the Service where funds were available, but had left the collection efforts up

to the Government. No request or direction was made to apply the funds in any particular manner. Clearly, the Internal Revenue Service had the right to apply the funds it collected from Jax's creditors to the debts of the corporation least likely to be collected. *Hewitt v. United States*, 5 Cir. 1967, 377 F.2d 921, 925; *Datolf v. United States*, 3 Cir. 1966, 370 F.2d 655, 658.

(3). Liddon's contention that the district court erroneously instructed the jury with respect to the burden of proof and to the question of wilfulness is sufficiently answered by the fact that Liddon did not object to the trial court's instructions nor to its refusal to give any requested instructions. As the court noted in denying Liddon's motion for judgment notwithstanding the verdict or in the alternative for new trial, "At the conclusion of the charge to the jury, the plaintiff took no exceptions to the instructions given by the Court and asked for no additional instructions. The only instructions refused were those on behalf of the defendant."

We have nonetheless examined the court's instructions and find them to be correct. Liddon had the burden of proving either that he was not a responsible "person" or that he did not wilfully fail to pay over the withheld taxes. The district court properly drew no distinction between the burden of proving Liddon's original claim for $22.34 and the Government's counterclaim for $21,014.94. A plaintiff seeking a refund of a partial payment of a section 6672 penalty has the burden of proving that the penalty assessment was erroneous both as to the plaintiff's refund claim and

as to the Government's counterclaim for the unpaid balance of the assessment. *Lesser v. United States*, 2d Cir. 1966, *en banc*, 368 F.2d 306, 310.

We have briefly discussed all of the contentions of the plaintiff-appellant which in our opinion require discussion, and we find no merit in any of them.

The Government's Cross-Appeal.

In Liddon's post-trial motion to alter or amend the judgment, he called attention that the Government failed to introduce any evidence at the trial to prove the date of notice and demand for the penalty.[1] In opposition, the Government submitted records certified by affidavit going to show that notice and demand for payment were mailed to Liddon on January 7, 1966. The district court nonetheless held:

> "As it was the burden of the government, in claiming interest, to show the date from which interest should have been computed, the court finds that such evidence should have been proffered during the trial, with the right of plaintiff to contest, and that its proffer after trial is not timely."

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[1] Interest on such penalty, is imposed prior to judgment "only if such assessable penalty * * * is not paid within 10 days from the date of notice and demand therefor, and in such case interest shall be imposed only for the period from the date of notice and demand to the date of payment." 28 U.S.C. § 6601(f) (3).

Though there is little or no dispute as to the actual facts, we hold that the district court did not abuse its discretion in refusing to consider the evidence proffered after trial.

However the record discloses that the Government's counterclaim was filed on April 13, 1967, and that Liddon's reply admits "that some form of notice of tax due in the approximate amount set forth *** was received by plaintiff." Thus the pleadings establish notice of the penalty and demand for payment by April 13, 1967. The judgment is therefore modified to include 6% interest from April 13, 1967. As so modified the judgment is affirmed.

MODIFIED AND AFFIRMED.

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29373

J. F. LIDDON,
Plaintiffs-Appellant-
Cross Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Southern District of Mississippi

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(October 29, 1971)

ON PETITION FOR REHEARING

Before RIVES, THORNBERRY and COLEMAN, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX H

STATUTES INVOLVED

Internal Revenue Code of 1954, as Amended

26 U. S. Code Sec. 3102 (a) Deduction of tax from wages.

"(a) Requirement. The tax imposed by Section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid * * * Aug. 16, 1954, c. 736, 68A Stat 415; Sept. 1, 1954, c. 1206, Title II, Section 205A, 68 Stat. 1903; Aug. 1, 1956, c. 836 Title II, Section 201 (h) (3), 70 Stat. 841; July 30, 1965, Pub. L. 89-97, Title III, Section 313 (c) (1), (2), 79 Stat. 382, 383."

26 U. S. Code Sec. 3402 (a) Income tax collected at source.

"(a) Requirement of withholding. Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables * * * As amended June 28, 1968, Pub.L. 90-364, Title I, 102(c) (1), (2), 82 Stat. 256, 259; June 30, 1969, Pub.L. 91-36, 2(a), 83 Stat. 42; Aug. 7, 1969, Pub.L. 91-53, 6(a), 83 Stat. 96; Dec. 30, 1969, Pub.L. 91-172, Title VIII, 805(a)-(e), (f) (1), (g), 83 Stat. 686, 704-708."

26 U. S. Code Sec. 6671 (b). Person defined.

"(b) The term 'person', as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employe, or member is under a duty to perform the act in respect of which the violation occurs. Aug. 16, 1954, c. 736, 68A Stat. 828.

26 U. S. Code Sec. 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

"Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for, and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable. Aug. 16, 1954, c. 736, 68A Stat. 828.